

# United States District Court

FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

VENUE: SAN JOSE

**FILED**

JUN 24 P 4:51

RICHARD W. STEINBOCK  
CLERK, U.S. DISTRICT COURT  
SANTA CLARA COUNTY, CALIF.

UNITED STATES OF AMERICA,

v.

E-filing **CR 10 0494**

**RMW**

BRIAN DUNNING,

DEFENDANT(S).

## INDICTMENT

VIOLATIONS: 18 U.S.C. § 1343 - Wire Fraud; 18 U.S.C. § 981 (a)  
(1)(C) and 28 U.S.C. § 2461 (c) - Criminal Forfeiture

*CR 10-0494 (AT)*

A true bill.

*Sydney Benjamin*  
Foreman

Filed in open court this 24 day of

June, 2010

*Frank Justiliano*  
FRANK JUSTILIANO  
Clerk

Bail, \$~~50,000~~ FOR 7-22-10 ISF

*[Signature]*

1 JOSEPH P. RUSSONIELLO (CSBN 44332)  
United States Attorney

FILED  
2010 JUN 24 P 4: 52  
U.S. DISTRICT COURT  
SAN JOSE, CALIFORNIA  
[Signature]

E-filing

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

RMW

10 SAN JOSE DIVISION

CR 10 0494  
No.

11 UNITED STATES OF AMERICA, )

12 Plaintiff, )

13 v. )

14 BRIAN DUNNING, )

15 Defendant. )  
16

VIOLATIONS: 18 U.S.C. § 1343 —  
Wire Fraud; 18 U.S.C. § 981(a)(1)(C)  
and 28 U.S.C. § 2461(c) — Criminal  
Forfeiture

SAN JOSE VENUE

17 INDICTMENT

18 The Grand Jury charges:

19 At all times relevant to this Indictment:

20 BACKGROUND

21 EBay, Inc.

22 1. EBay, Inc. ("eBay") was a corporation headquartered in San Jose, California.  
23 EBay owned and operated a popular on-line marketplace that enabled people to sell goods  
24 or services locally, nationally, and internationally using the Internet via eBay's websites  
25 (collectively referred to herein as "eBay.com"). One of eBay's most popular services was  
26 the on-line auction, which allowed registered sellers to list goods or services for sale on  
27 eBay.com. Sellers commonly provided descriptions and photographs of the items posted  
28 for sale, and registered buyers could bid on-line for these items prior to the set end date

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1 and time of the auction. In some circumstances, registered buyers could purchase items  
2 without engaging in an auction through eBay's "Buy It Now" option. eBay earned  
3 revenue each time a seller posted an item for sale on eBay.com, as well as each time a  
4 seller sold an item on eBay.com.

5 **Ebay's Affiliate Program**

6 2. eBay developed what is referred to herein as the "Affiliate Program." The  
7 Affiliate Program was a means by which eBay worked with third-party marketers to  
8 "drive" Internet "traffic" to eBay.com.

9 3. Under eBay's Affiliate Program, it was intended that a third-party affiliate  
10 would send visitors to eBay.com from a website associated with the affiliate, and would do  
11 so (at least in theory) by suggesting (in some way) that the visitor "click" on a "link" to  
12 eBay.com located on the affiliate's website. If, within specified time periods, such visitors  
13 to eBay.com became new active users, won auctions, or made Buy-It-Now purchases on  
14 eBay.com, the affiliate received compensation from eBay. A "new active user" was  
15 defined to include a user who both set up a new eBay.com account and then placed a bid  
16 (whether that bid was a winning bid or not). For purposes of this Indictment, the actions  
17 of becoming a new active user, winning an auction, and making a purchase are referred to  
18 collectively as "revenue actions."

19 4. The Affiliate Program defined the rates and amounts of compensation that  
20 eBay paid to an affiliate. These rates and amounts of compensation were based on the  
21 monthly totals of revenue actions attributable to that affiliate. For instance, if 1 to 49 of  
22 the individuals the affiliate referred to eBay became new active users within 30 days, eBay  
23 paid the affiliate \$25.00 per new user. As another example, if the individuals that the  
24 affiliate referred to eBay won auctions for items totaling \$99.99 in value within seven  
25 days, eBay paid the affiliate 50% of the revenue earned by eBay on those transactions.  
26 Each of these rates of compensation increased as the total number of new active users and  
27 the total amount of sales attributable to referrals from a particular affiliate increased.

28 5. In order to become a member of the Affiliate Program, a would-be affiliate

1 registered through another company, Commission Junction, Inc. ("CJ"). eBay contracted  
2 with CJ not only to register affiliates, but also to assist affiliates with their accounts and to  
3 monitor affiliates' activity to ensure quality control and compliance with the rules and  
4 regulations governing the Affiliate Program. CJ generally paid affiliates on a monthly  
5 basis, with funds provided by eBay.

6 **Brian Dunning and Kessler's Flying Circus**

7 6. The defendant Brian Dunning was an individual who resided in the Central  
8 District of California. Kessler's Flying Circus was a partnership that was owned, in part,  
9 and both directly and indirectly, by Dunning. Dunning was also the sole owner of the  
10 company Thunderwood Holdings, Inc., and he did business as BrianDunning.com.  
11 Thunderwood Holdings, together with the company Dunning Enterprise, Inc., did business  
12 as Kessler's Flying Circus. These non-person entities are referred to herein collectively as  
13 "Kessler's Flying Circus."

14 7. Kessler's Flying Circus was a member of the Affiliate Program. In 2006,  
15 Kessler's Flying Circus received approximately \$2,800,000 in compensation from the  
16 eBay Affiliate Program in the United States. Between January and June 2007, Kessler's  
17 Flying Circus earned more than \$2,500,000 in compensation from the eBay Affiliate  
18 Program in the United States. As of approximately June 2007, Kessler's Flying Circus  
19 was the number-two producing account in the Affiliate Program. In other words, based on  
20 data provided to eBay, Kessler's Flying Circus was purported to be the affiliate that drove  
21 the second-most revenue-producing traffic to eBay.com.

22 **Affiliate Program Tracking**

23 8. eBay used an automated tracking process in an effort to ensure that affiliates  
24 received appropriate compensation. This tracking process utilized "cookies."

25 9. In Internet parlance, the term "cookie" refers to a text file that is generated  
26 by a website's servers when a user on a remote computer accesses it. The cookie is sent to  
27 the user's computer by the website's servers, and is thereafter placed (or "dropped") on  
28 that user's computer. The cookie includes information such as user preferences for a

1 particular user, connection data (including time and date of use), records of user activity  
2 (including files accessed, services used, or "shopping cart" contents), and account  
3 information (including usernames and passwords). The information contained in that  
4 cookie is then transmitted by the user's computer to the website on subsequent visits to  
5 that website by the user so that, based on that information, the website may better serve the  
6 user's particular needs and preferences.

7 10. In the eBay Affiliate Program, when a visitor was referred to eBay.com from  
8 an affiliate website, eBay "dropped" a "cookie" on that user's computer. This cookie  
9 contained information that was used to identify the Affiliate Program member that had  
10 directed that particular user to eBay.com. This information is referred to herein  
11 collectively as the "Affiliate ID."

12 11. If and when that user later engaged in a revenue action on eBay.com, the  
13 Affiliate ID would be transmitted by the user's computer to eBay. An automated tracking  
14 process performed the analysis to determine whether the revenue action had occurred  
15 within the specified time frames.

16 12. If cookies from more than one affiliate were present on the user's computer  
17 at the time of the revenue action, the affiliate identified in the most recent cookie dropped  
18 on the user's computer was credited with the revenue action. Similarly, if there was no  
19 qualifying cookie on the user's computer at the time of the revenue action, then no affiliate  
20 was credited.

21 13. This process was intended to ensure that affiliates in the Affiliate Program  
22 received appropriate compensation from eBay based on the rates and amounts of  
23 compensation defined by the Affiliate Program.

24 **Affiliate Program Terms and Conditions**

25 14. EBay affiliates such as Kessler's Flying Circus agreed to certain terms and  
26 conditions required by eBay in order to participate in the Affiliate Program. These terms  
27 and conditions provided that the affiliate would not deliver any eBay-related cookies or  
28 other tracking tags to the computers of the affiliate's user when the user was merely

1 viewing the affiliate's advertisements or while the affiliate's applications were merely  
2 active or open on the affiliate's user's computer.

3 15. In addition, eBay affiliates such as Kessler's Flying Circus accepted the  
4 terms of CJ's Publisher Service Agreement ("PSA") at the time of the affiliate's  
5 registration in the Affiliate Program. The PSA informed affiliates that certain behavior  
6 was not acceptable and was grounds for removal from the Affiliate Program. Prohibited  
7 behavior included generating visitor clicks using any "device, program, [or] robot." The  
8 PSA also required each affiliate to provide CJ and eBay with accurate and up-to-date  
9 information about the affiliate's promotional methods.

10 "Cookie Stuffing"

11 16. For purposes of this Indictment, "cookie stuffing" is the act of depositing, or  
12 causing to be deposited, a cookie containing an Affiliate ID onto a user's computer  
13 without that user having clicked on an advertisement or link.

14 THE SCHEME

15 17. As set forth more fully below, beginning on a date unknown to the Grand  
16 Jury, but no later than in or about early 2006, and continuing to in or about June 2007, in  
17 the Northern District of California and elsewhere, the defendant,

18 BRIAN DUNNING,

19 did knowingly devise and intend to devise, and did participate in, a material scheme and  
20 artifice to defraud, and to obtain money and property by means of materially false,  
21 misleading, and fraudulent pretenses, representations, omissions, and promises, which  
22 scheme and artifice is summarized below.

23 18. It was part of the scheme and artifice that, through various means, the  
24 defendant disseminated on a large number of web pages computer code that, when those  
25 web pages were viewed by a computer user, was designed to cause that user's computer to  
26 make a request to eBay's home page merely for the purpose of prompting eBay's servers  
27 to serve up a cookie, which would then be "stuffed" onto the user's computer. These  
28 cookies contained information that identified an Affiliate ID of Kessler's Flying Circus.

1 In such situations, the human user never actually clicked on an eBay advertisement or link  
2 on Dunning's affiliate websites.

3 19. It was further part of the scheme and artifice that, in such situations, the  
4 computer code prevented eBay's home page from actually "loading" on the user's  
5 computer screen. Accordingly, the human user never actually viewed eBay's home page  
6 when an eBay cookie identifying Kessler's Flying Circus was stuffed onto the user's  
7 computer. Indeed, the human user never knew that the user's computer had made a  
8 request to the website (i.e., eBay.com) that had served up the cookie to be stuffed onto the  
9 computer.

10 20. It was further part of the scheme and artifice that the defendant attempted to  
11 place this computer code on a large number of web pages, including web pages that were  
12 not directly affiliated with Kessler's Flying Circus, all for the purpose of increasing the  
13 number of computers onto which cookies containing information identifying the Affiliate  
14 IDs of Kessler's Flying Circus would be stuffed.

15 21. It was further part of the scheme and artifice that the defendant had the  
16 expectation and intention that many of the users whose computers had had cookies stuffed  
17 on them would thereafter visit eBay.com and engage in revenue actions. If these revenue  
18 actions were within the time periods specified in the Affiliate Program, Kessler's Flying  
19 Circus would receive compensation from eBay with respect to those events. The  
20 defendant had the expectation and intention that these visits to eBay.com would be of each  
21 user's own accord, and would be separate and apart from any actions taken by the  
22 defendant to "drive" those users to eBay.com.

23 22. It was further part of the scheme and artifice that, in the situations described  
24 in the previous paragraph, the defendant caused these users' computers to transmit  
25 misrepresentations of material facts to eBay, in that these users' computers transmitted  
26 information contained in cookies stuffed onto those users' computers that falsely  
27 represented to eBay that the defendant's affiliate had originally directed the users to  
28 eBay.com and that, by implication, the affiliate was entitled to compensation from eBay if



1 the users engaged in revenue actions within the specified time periods. In fact, the affiliate  
2 was not entitled to compensation from eBay with respect to the vast majority of revenue  
3 actions.

4 23. It was further part of the scheme and artifice that the defendant took certain  
5 actions in order to prevent eBay and CJ from detecting his fraudulent scheme. These  
6 actions included, but were not necessarily limited to avoiding stuffing cookies on  
7 computers that appeared to be located in San Jose, California (the location of eBay's  
8 headquarters) or in Santa Barbara, California (the location of CJ's headquarters).

9 24. It was further part of the scheme and artifice that the defendant made  
10 misrepresentations and omissions of material facts to eBay and/or Commission Junction  
11 with respect to his activities. For example, on or about September 7, 2006, the defendant  
12 falsely stated in an e-mail to an eBay employee that he was "absolutely confident" that his  
13 methods were "in line with the intended spirit of the terms" of the Affiliate Program.

14 COUNTS ONE THROUGH FIVE: 18 U.S.C. § 1343 - Wire Fraud

15 25. The factual allegations in paragraphs 1 through 24 are re-alleged and  
16 incorporated herein as if set forth in full.

17 26. Beginning on a date unknown to the Grand Jury, but by no later than in or  
18 about early 2006, and continuing to in or about June 2007, in the Northern District of  
19 California, and elsewhere, the defendant,

20 BRIAN DUNNING,

21 did knowingly devise and intend to devise and intend to devise, and did participate in, a  
22 material scheme and artifice to defraud eBay and Commission Junction as to a material  
23 matter and to obtain money and property by means of materially false, misleading, and  
24 fraudulent pretenses, representations, omissions, and promises, and by the concealment of  
25 material facts.

26 USE OF THE WIRES

27 27. On or about the dates listed below, for the purpose of executing the scheme

28 ///

INDICTMENT  
[DUNNING]



1 and artifice to defraud set forth above, and attempting to do so, the defendant

2 BRIAN DUNNING

3 did knowingly transmit and cause to be transmitted, in interstate and foreign commerce, by  
4 means of a wire communication, certain writings, signs, and signals, that is, transmissions  
5 of cookies from an eBay computer server in San Jose, CA, to computers and computer  
6 servers in other states and countries, as exemplified within the separate counts below,  
7 where in each instance the individual did not click on an eBay advertisement or link:

COUNT	DATE	LOCATION OF COMPUTER OR COMPUTER SERVER AND IP ADDRESS OF USER	NATURE OF WIRE COMMUNICATION
One	06/08/07	Virginia IP Address 172.174.248.28	Cookie identifying Affiliate ID 2028993, pertaining to Kessler's Flying Circus
Two	06/08/07	United Kingdom (England) IP Address 86.132.112.91	Cookie identifying Affiliate ID 2028993, pertaining to Kessler's Flying Circus
Three	06/09/07	United Kingdom (England) IP Address 87.74.32.80	Cookie identifying Affiliate ID 2326993, pertaining to Kessler's Flying Circus
Four	06/11/07	United Kingdom (England) IP Address 88.105.18.148	Cookie identifying Affiliate ID 2326993, pertaining to Kessler's Flying Circus
Five	06/11/07	Ireland IP Address 89.101.229.12	Cookie identifying Affiliate ID 2326993, pertaining to Kessler's Flying Circus

20 All in violation of Title 18, United States Code, Section 1343.

21 FORFEITURE ALLEGATION: 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c)

22 28. The preceding factual allegations of this Indictment are hereby re-alleged  
23 and by this reference fully incorporated herein for the purpose of alleging forfeiture  
24 pursuant to the provisions of 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. 2461(c).

25 29. Upon conviction of one or more of the offenses alleged in Counts One  
26 through Five of this Indictment, the defendant,

27 BRIAN DUNNING,

28 shall forfeit to the United States pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C.

INDICTMENT  
[DUNNING]

1 § 2461(c) all property constituting, and derived from, proceeds the defendant obtained,  
2 directly and indirectly, as the result of those violations.

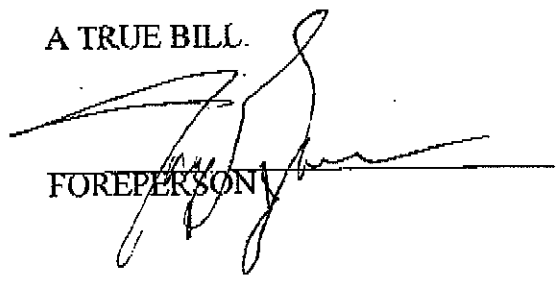
3 30. If any of the aforementioned property, as a result of any act or omission of  
4 the defendant —

- 5 a. cannot be located upon the exercise of due diligence;
- 6 b. has been transferred or sold to, or deposited with, a third person;
- 7 c. has been placed beyond the jurisdiction of the Court;
- 8 d. has been substantially diminished in value; or
- 9 e. has been commingled with other property that cannot be divided without  
10 difficulty;

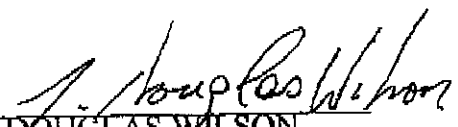
11 any and all interest defendant has in other property shall be vested in the United States and  
12 forfeited to the United States pursuant to 21 U.S.C. § 853(p), as incorporated by 28 U.S.C.  
13 § 2461(c).


14 DATED: June 24, 2010

A TRUE BILL.

  
FOREPERSON

18 JOSEPH P. RUSSONIELLO  
United States Attorney

19  
20   
21 J. DOUGLAS WILSON  
Acting Chief, Criminal Division

22  
23 (Approved as to form:   
AUSA WALDINGER

28  
INDICTMENT  
[DUNNING]

AO 257 (Rev. 6/75)

DEFENDANT INFORMATION RELATIVE TO A CRIMINAL ACTION - IN U.S. DISTRICT COURT

BY:  COMPLAINT  INFORMATION  INDICTMENT  SUPERSEDING

OFFENSE CHARGED

Title 18, United States Code, Section 1343 - Wire Fraud (Five Counts)

Forfeiture Allegation

- Petty
 Minor
 Misdemeanor
 Felony

E-filing

PENALTY:

Maximum term of imprisonment of 20 years, maximum fine of \$250,000 or twice the gross gain/loss (whichever is greater), 3 years of supervised release, \$100 special assessment (per count)

Name of District Court, and/or Judge/Magistrate Location

NORTHERN DISTRICT OF CALIFORNIA

FILED

2010 JUN 24 4:52

DEFENDANT

BRIAN DUNNING

DISTRICT COURT NUMBER

CR 10 0494

RMW

PROCEEDING

Name of Complainant Agency, or Person (& Title, if any) Federal Bureau of Investigation

person is awaiting trial in another Federal or State Court, give name of court

this person/proceeding is transferred from another district per (circle one) FRCrp 20, 21, or 40. Show District

this is a reprosecution of charges previously dismissed which were dismissed on motion of:

U.S. ATTORNEY  DEFENSE

SHOW DOCKET NO.

this prosecution relates to a pending case involving this same defendant

MAGISTRATE CASE NO.

prior proceedings or appearance(s) before U.S. Magistrate regarding this defendant were recorded under

Name and Office of Person Furnishing Information on this form Joseph P. Russoniello

U.S. Attorney  Other U.S. Agency

Name of Assistant U.S. Attorney (if assigned) KYLE F. WALDINGER

This report amends AO 257 previously submitted

ADDITIONAL INFORMATION OR COMMENTS

PROCESS:

SUMMONS  NO PROCESS\*  WARRANT

If Summons, complete following:

Arraignment  Initial Appearance

Defendant Address: [REDACTED]

Bail Amount: \_\_\_\_\_

\* Where defendant previously apprehended on complaint, no new summons or warrant needed, since Magistrate has scheduled arraignment.

Date/Time: July 22, 2010, 9:30 a.m. Before Judge: San Jose Duty Mag.

Comments: \_\_\_\_\_